United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

B P/S

75-1321

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1321

UNITED STATES OF AMERICA,

Appellee,

—v.—

ADOLPHO RIVERA, JR.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Adolpho Rivera, Jr. appeals from a sentence imposed on August 29, 1975, in the United States District Court for the Southern District of New York by the Honorable Inzer B. Wyatt, United States District Judge.

Indictment 75 Cr. 44, filed January 16, 1975,* charged Rivera and Raphael Fontanez in Counts Two and Three with assault on Jerry Castillo, a Special Agent of the Drug Enforcement Administration, with intent to rob him of $14,000 belonging to the United States. Title 18, United States Code, Section 2114. Counts Four and Five charged Rivera and Fontanez with assault on a federal

* This indictment superseded 74 Cr. 1013, filed October 29, 1974.

officer, Agent Castillo. Title 18, United States Code, Section 111, 1114.* Of the remaining counts in the indictment, Count Seven charged Fontanez alone and Counts One and Six were dismissed during trial.

Rivera's trial ** commenced on January 28, 1975, and concluded with guilty verdicts on Counts Two through Five the same day.

On March 7, 1975, Judge Wyatt sentenced Rivera to 25 years imprisonment on Count Three, fifteen years to be spent in confinement and the balance on probation, and to a concurrent term of ten years imprisonment on Count Five.

Rivera appealed to this Court, arguing among other things that Counts Two and Three were improperly laid under Section 2114 for want of a nexus with the Postal Service. This Court agreed and reversed the convictions on those two counts with directions that they be dismissed. The convictions on Counts Four and Five were affirmed but the case was remanded for resentencing on those counts "to insure that the original sentences on Four and Five were not affected by the twenty-five year sentence meted out on the now reversed Count Three." *United States* v. *Rivera*, 521 F.2d 125, 129 (2d Cir. 1975).

On August 29, 1975, Judge Wyatt resentenced Rivera on Count Five to ten years imprisonment. This appeal followed.

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* Count Three and Count Five charged aggravated forms of the offenses charged in Counts Two and Four, alleging respectively the endangering of Castillo's life with a revolver (Count Three) and use of a deadly weapon (Count Five).

** Fontanez had been found incompetent to stand trial.

Statement of Facts

The facts of the case are set forth in the opinion of this Court. 521 F.2d at 126-127. Briefly, Agent Castillo negotiated with Fontanez for the purchase of a kilogram of heroin for $14,000. Arrangements were made to consummate the transaction and Castillo, with the money, was driven by Fontanez in Castillo's car to a location in the Bronx to pick up the heroin. Fontanez left Castillo at the car for a brief period, returning with a brown paper bag, later found to contain coffee, and accompanied by Rivera, previously described by Fontanez as his "source". Fontanez pulled a loaded .38 caliber revolver, forced Castillo to let Rivera into the car, and, while Rivera held Castillo's hands behind his back, announced to Castillo that he was going to murder him. Castillo begged for his life, and as Fontanez prepared to drive Castillo elsewhere to kill him, other agents conducting surveillance of the transaction intervened.

Rivera's defense, based entirely on his own testimony, was that he had had nothing to do with the attempted robbery and murder of Agent Castillo and had been at the scene only because Fontanez had agreed to give him a ride home.

ARGUMENT

Judge Wyatt did not abuse his discretion in refusing to commit Rivera for study under Section 4208(b) of Title 18.

Rivera's sole claim on appeal is that Judge Wyatt abused his discretion in declining to commit Rivera for study pursuant to 18 U.S.C. § 4208(b) before a final determination of his sentence. The claim is without merit.

Rivera's claim is based exclusively on the following colloquy at the time Rivera was resentenced:

> "MR. MOGEL [defense counsel]:
>
> * * * * *
>
> There is another comment I would like to make regarding that presentence report. It was an extraordinarily meager report, and it was quite static, despite the fact that contained within the report was a signal that there was a rather profound psychological problem with Mr. Rivera.
>
> There was an evaluation done when he was in the Army in the stockade which is quoted in part, and I read from that psychiatric report dated May 10, 1971:
>
> > 'Explosive personality. Chronic moderateness is manifested by frequent outbursts of hostility. Poor judgment especially under stress. Strong sensitivity to separation and abandonment and poor self-esteem.'
> >
> > And that's the extent of the whole thing.
> >
> > Your Honor, given the nature of the facts alleged as to the course of this crime, I would respectfully ask your Honor to consider hav-

ing Mr. Rivera evaluated under the provisions of 4208(b), and not sentencing him until there is a further evaluation which gives some insight into the dynamics of his personality and the possibility of any training or change.

As it stands now, he has been at Lewisburg for approximately eleven months. He has had no difficulty in Lewisburg. He has been working in industry there, particularly in the sewing factory, and he has not been placed in a program at Lewisburg because of the pendancy of the appeal.

The information that Lewisburg has is merely the information which is contained in the presentence report, and I think in fairness to the defendant and to society there should be additional evaluation of Mr. Rivera.

THE COURT: I am not sympathetic, Mr. Mogel, with that suggestion. I think the nature of the offense precludes my adopting your suggestion" (Tr. at 4-5).*

From Judge Wyatt's refusal to commit Rivera for study and the reason the Judge gave, Rivera infers that "the District Judge imposed the sentence he did solely in consideration of the crime involved, without reference to appellant's personal qualities and characteristics, including his psychiatric status and needs", which Rivera characterizes as an improper "mechanical approach to sentencing" (Brief at 5, 6). The flaw in Rivera's argument is that he focuses on a very limited portion of the transcript, relating not to Judge Wyatt's reasons for the sentence imposed but rather to the considerations for his refusal to order further inquiry into Rivera's background

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* "Tr." refers to the sentencing minutes of August 29, 1975.

and personality. Moreover, the record of the sentencing affirmatively demonstrates that Judge Wyatt was not taking the "mechanical approach to sentencing" disapproved in such cases as *United States* v. *Baker*, 487 F.2d 360 (2d Cir. 1973), relied on by Rivera.

Section 4208(b) allows a court to commit a defendant for study "[i]f the Court desires more detailed information as a basis for determining the sentence to be imposed..." The language of the statute establishes that trial judges have virtually unfettered discretion whether to order such a study, and it is clear that the purpose of the study authorized by the staute is simply to assist a District Judge who feels that he lacks adequate information upon which to determine a proper sentence; Judge Wyatt, who had ordered and received a presentence report not claimed to be otherwise deficient, simply felt no need for further information. Moreover, it is quite plain from the procedures for developing information for sentence provided by statute and the Federal Rules of Criminal Procedure that in almost all cases a presentence report (Fed. R. Crim. P. 32(c)(2)) is the primary and sufficient source of information about a defendant's background and personal characteristics. Any doubt of the exceptional nature of a committal for study under Section 4208(b) is dispelled by the legislative history of that subsection, for both the Senate report, S. Rep. No. 2013, 85th Cong., 2d Sess. (1958), and the Conference report specifically stated that the procedure authorized by the statute was for use in "particularly complex cases". 2 U.S. Code, Cong. and Ad. News 3891, 3892, 3905 (1958). No showing is made that this is a "particularly complex case".

Moreover, contrary to Rivera's claim, the reason assigned by Judge Wyatt for declining to order such a study —"the nature of the offense"—was a fully proper one. There is no case cited for Rivera which finds an abuse

of discretion in not ordering a study under Section 4208 (b), and we have uncovered none. Further, since it is clear that such a study is to be the adjunct in exceptional cases of a presentence report, the ordering of which is also discretionary with the District Court, the reason given by Judge Wyatt for not ordering a Section 4208(b) study was entirely appropriate because, on this record, it would have adequately supported an exercise of discretion not to order even a presentence report. *United States* v. *Warren*, 453 F.2d 738, 743-744 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972).* See also *United States* v. *Heng Awkak Roman*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 978 (1974).** That being the case, it can hardly be suggested that Judge Wyatt, who had a presentence report, abused his discretion in not seeking further information which he did not believe he needed.

Moreover, while Rivera appears to rely on the typically obscure jargon of some kind of report on his personality prepared at an Army stockade in 1971 as evidence that Rivera

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* In *Warren* this Court sustained Judge Motley's refusal to order a presentence report before sentencing a physician to five years imprisonment for unlawful sale of amphetamines on the ground that "[t]he [district] court felt that the offense, involving serious danger to the physical and mental health of many hundreds of unsuspecting people, was a particularly callous example of the increasingly severe problem of drug abuse." *Id.* at 744. The Court also noted, *id.* at 743, that "[t]he judge has been held to have discretion to dispense with the report if he feels it will not affect the disposition", citing *United States* v. *Visconti*, 261 F.2d 215 (2d Cir. 1958), *cert. denied*, 359 U.S. 954 (1959) and *United States* v. *Schwenke*, 221 F.2d 356 (2d Cir. 1955). Rivera's participation in a nearly successful plan to rob and murder a narcotics agent clearly justified similar sentiments.

** Both *Warren* and *Roman* note that in taking the unusual course of dispensing with a presentence report, a trial judge should state his reasons for the record. While that requirement may not have survived *Dorszynski* v. *United States*, 418 U.S. 424, 441 (1974), it was plainly met here nevertheless.

needed a psychiatric evaluation, there has never been any suggestion in this case that Rivera suffered from any mental illness or defect.* Judge Wyatt was in a proper position to assess the need for such a psychiatric evaluation, for he not only had a presentence report on Rivera but had heard him testify at trial. Moreover, in the same breath in which he asked for an additional study of Rivera on "psychological" grounds, his counsel told Judge Wyatt that Rivera "has been at Lewisburg for approximately eleven months. He had had no difficulty in Lewisburg. He has been working in industry there, particularly in the sewing factory . . .", hardly a showing that Rivera needed a special psychiatric evaluation.

Finally, Rivera's argument that in imposing sentence Judge Wyatt acted "mechanically" is contrary to the record. Judge Wyatt reviewed the change, since the original sentencing, in the status of state charges pending against Rivera, to which he had recently pleaded guilty (Tr. 3-4); his prior conviction for assault (Tr. 10); and the presentence report (Tr. 2, 5). Judge Wyatt reconsidered the sentence in light of the opinion of the Court of Appeals (Tr. 11-12), expressed his concern for rehabilitation of the defendant (Tr. 7), discussed the possibilities for parole given Rivera's pending state court cases (Tr. 6-8), invited comments and discussion from counsel on the possibility of sentence under Section 4208(a)(2) (Tr. 8), and suggested that a motion to reduce sentence might be in order after sentences were imposed on the offenses to which Rivera had just pleaded guilty in state court (Tr. 9).

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* At the time of Rivera's initial sentencing in this case, no suggestion was made that a committal for study under Section 4208(b) might be appropriate.

CONCLUSION

Rivera's sentence should not be disturbed.

Respectfully submitted,

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